This problem will not arise in regard to any acts or omissions by the employer occurring on or after May 14, 1947, because section 10 provides that the employer, insofar as the Fair Labor Standards Act is concerned, may rely only upon regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies of the Administrator of the Wage and Hour Division.[100]

§ 790.16 "In reliance on."

(a) In addition to acting (or omitting to act) in good faith and in conformity with an administrative regulation, order, ruling, approval, interpretation, enforcement policy or practice, the employer must also prove that he actually relied upon it.[101]

(b) Assume, for example, that an employer failed to pay his employees in accordance with the overtime provisions of the Fair Labor Standards Act. After an employee suit has been brought against him, another employer calls his attention to a letter that had been written by the Administrator of the Wage and Hour Division, in which the opinion was expressed that employees of the type employed by the defendant were exempt from the overtime provisions of the Fair Labor Standards Act. The defendant had no previous knowledge of this letter. In the pending employee suit, the court may decide that the opinion of the Administrator was erroneous and that the plaintiffs should have been paid in accordance with the overtime provisions of the Fair Labor Standards Act. Since the employer had no knowledge of the administrator's interpretation at the time of his violations, his failure to comply with the overtime provisions could not have been ''in reliance on'' that interpretation; consequently, he has no defense under section 9 or section 10 of the Portal Act.

§ 790.17 "Administrative regulation, order, ruling, approval, or interpretation."

(a) Administrative regulations, orders, rulings, approvals, and interpretations are all grouped together in sections 9 and 10, with no distinction being made in regard to their function under the ''good faith'' defense. Accordingly, no useful purpose would be served by an attempt to precisely define and distinguish each term from the others, especially since some of these terms are often employed interchangeably as having the same meaning.

(b) The terms ''regulation'' and ''order'' are variously used to connote the great variety of authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[102]

(c) The term ''interpretation'' has been used to describe a statement ''ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language.''[103] This would include bulletins, releases, and other statements issued by an agency which indicate its interpretation of the provisions of a statute.

(d) The term ''ruling'' commonly refers to an interpretation made by an

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an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him.'' Representative Gwynne made a similar statement (93 Cong. Rec. 1563).

[100] Statement of Senator Wiley explaining Conference agreement to the Senate, 93 Cong. Rec. 4270; statement of Representative Walter, 93 Cong. Rec. 4389.

[101] In a colloquy between Senators Thye and Cooper (93 Cong. Rec. 4451), Senator Cooper pointed out that the purpose of section 9 was to provide a defense for an employer who pleads and proves, among other things, that his failure to bring himself under the Act ''grew out of reliance upon'' the ruling of an agency. See also statement of Representative Keating, 93 Cong. Rec. 1512; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; cf. colloquy between Senators Donnell and Ball, 93 Cong. Rec. 4372.

[102] See Final Report of Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong. 1st sess. (1941) p. 27; 1 Vom Baur, Federal Administrative Law (1942) p. 486; sections 2(c), 2(d) and 10(e) of the Administrative Procedure Act, 5 U.S.C.A. section 1001.

[103] Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st sess. (1941), p. 27.